92-911

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1992

PIPEFITTERS PENSION TRUST;
PIPEFITTERS LOCAL UNION NO. 562;
JOHN MARSHAL, administrator and
fiduciary of all plaintiff funds;
LESTER GROSS, JOE BARRY, DON DEVITT,
ROBERT MCDONALD, trustees,

Petitioners,

v.

RUSSELL WALDO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 6, 1992

QUESTIONS PRESENTED

I

WHETHER THE DOMINANT SHAREHOLDER AND OFFICER OF A CORPORATION IS AN EMPLOYER AS THAT TERM IS DEFINED BY THE EMPLOYEE INCOME RETIREMENT SECURITY ACT (ERISA) AND PERSONALLY LIABLE FOR THE CORPORATION'S FAILURE TO MAKE EMPLOYEE BENEFIT FUND CONTRIBUTIONS.

II

WHETHER THE COURT OF APPEALS APPLIED THE PROPER RULE OF LAW IN DECIDING THAT THE SOLE SHAREHOLDER AND OFFICER OF A CLOSELY HELD CORPORATION WAS NOT PERSONALLY LIABLE FOR THE CORPORATION'S UNPAID CONTRIBUTIONS TO EMPLOYEE BENEFIT FUNDS GOVERNED BY ERISA.

LIST OF PARTIES

The parties to the proceedings below were the Respondents Russell Waldo, R. Waldo, Inc. and Waldo, R., Inc., and Petitioners Pipefitters Health and Welfare Trust, Pipefitters Pension Trust and Pipefitters Local Union No. 562; John Marshall, administrator and fiduciary of the Respondents funds; Lester Gross, Joe Barry, Don Devitt and Robert McDonald, trustees.

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PIPEFITTERS HEALTH AND WELFARE TRUST;
PIPEFITTERS PENSION TRUST;
PIPEFITTERS LOCAL UNION NO. 562;
JOHN MARSHALL, ADMINISTRATOR AND
FIDUCIARY OF ALL PLAINTIFF FUNDS;
LESTER GROSS, JOE BARRY, DON DEVITT,
ROBERT MCDONALD, TRUSTEES,

Petitioners,

v.

RUSSELL WALDO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Pipefitters Local Union No. 562 ("Union") requests that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reprinted at Appendix B. The opinion of the Court of Appeals, is reported at 872 F.2d 815 (8th Cir. 1989).

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 16, 1992. A timely filed Petition for Rehearing was denied on August 12, 1992. (Appendix A) This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Russell Waldo operated R. Waldo, Inc., a company engaged in the business of Mechanical Contracting such as plumbing, heating, air conditioning and underground piping. R. Waldo Inc. was party to a

Collective Bargaining Agreement with the Congress of Independent Unions which was in effect from 1981 through 1984.

In 1982, a business representative for the Petitioner Pipefitters Local Union No. 562, contacted Russell Waldo about signing a Collective Bargaining Agreement with the Pipefitters Local Union No. 562. A second company was incorporated, Waldo R. Inc., for the purpose of bidding for projects which required an AFL-CIO Union labor force. Russell Waldo signed a Collective Bargaining Agreement with the Pipefitters on behalf of Waldo R. Inc. Russell Waldo agreed to phase out work that was being performed by R. Waldo Inc. as that work was completed. Waldo R. Inc. would then employ the former R. Waldo Inc. employees pursuant to the terms of the Pipefitters Collective Bargaining

Agreement.[1]

The two construction companies were not operated as Russell Waldo had represented and the Pipefitters had expected. Waldo R. Inc. never bid on any projects and never had work other than that which it subcontracted from R. Waldo Inc. Both corporations were owned and operated by Russell Waldo from the same office with the same personnel and using the same equipment.

In 1983, Pipefitters renewed its contract with Waldo R. Inc. The contract ran from June 1, 1983 through and until May 31, 1986. The contract contained provisions for payment to the Union of initiation fees, dues and assessments as well as contributions to an Employee Health and Welfare Trust Fund and Pension

[1]See Pipefitters Health and Welfare Trust et al. v. Waldo R. Inc., 872 F.2d 815 (8th Cir. 1989).

Fund. The Pipefitters filed suit in the United States District Court for the Eastern District of Missouri when Waldo R. Inc. failed to abide by the terms of the Collective Bargaining Agreement by failing to pay wages set out in the Agreement and to make contributions based on hours worked by employees to the Employee Benefit Funds.

In a decision issued April 17, 1989, the United States Court of Appeals for the Eighth Circuit held that R. Waldo Inc. and Waldo R., Inc. were alter-egos and that R. Waldo, Inc. became bound by the terms of the Pipefitters Contract effective April 15, 1984, Pipefitters Health and Welfare Trust Fund v. Waldo, R. Inc., supra. As of that date, the Court held that R. Waldo Inc. was obligated to pay its employees at the wage rates set out in the Pipefitters Agreement. R. Waldo Inc. was further obligated to make contributions to the

Employee Benefit Funds in accordance with the terms set out in the written trust agreement and the Collective Bargaining Agreement. The Court remanded the matter to the District Court for the Eastern District of Missouri, Eastern Division, to determine the amount of any money owed by R. Waldo Inc. or Waldo R. Inc. to Pipefitters Local No. 562. The Court also remanded the matter to the District Court to determine whether or not Russell Waldo was personally liable for the contractual obligations of R. Waldo Inc. and Waldo R. Inc.

On May 10, 1990, the District Court for the Eastern District of Missouri held R. Waldo Inc. liable in the amount of Seven Hundred Forty One Thousand One Hundred Eighty Nine Dollars ($741,189.00) in unpaid wages, delinquent contributions to Funds, interest on these amounts, attorneys fees and costs. The Court

considered whether Russell Waldo could be held liable for the delinquent contributions of R. Waldo Inc. to the ERISA Funds as an employer solely on the basis of his status as the dominant shareholder and officer of the corporation. The District Court followed the decision of the Court of Appeals for the Eighth Circuit in Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989) and held that corporate officers could not be held personally liable as an employer under ERISA where there is no basis for piercing the corporate veil.

The District Court then considered whether, pursuant to Seymour v. Hull & Moreland Engineering, 605 F.2d 1105 (9th Cir. 1979), there were sufficient grounds to pierce the corporate veil and hold Russell Waldo personally liable for debts of the corporation. The District Court found that Russell Waldo observed the

appropriate corporate formalities, operated the corporations for a legitimate purpose and that any trouble the Plaintiffs may have in recovering on the Judgment would not alone constitute an inequitable result warranting piercing of the corporate veil. The Court refused to hold Russell Waldo personally liable for the debts of the corporations.

On July 16, 1992 the Court of Appeals affirmed the decision of the District Court. The Court held that there was no reason to conclude that Title 29 U.S.C. §1002(5) was intended to include a dominant shareholder and officer within the meaning of the definition of "employer" and thus liable as an employer for unpaid ERISA contributions. The Court further agreed with the District Court as to the factors to be applied in determining whether to pierce the corporate veil. The Court refused to apply

a less onerous standard for piercing the corporate veil for purposes of determining the liability of a corporate officer for unpaid ERISA contributions. The Court held that the federal policies evidenced by the statutory safeguards of the ERISA statute did not justify an increased willingness to pierce the corporate veil. Finally, the Court of Appeals affirmed the decision of the District Court in finding that the facts of the instant case did not warrant piercing the corporate veil and attaching personal liability to Russell Waldo for unpaid ERISA contributions. The Petitioner's timely Motion for Rehearing by the Panel was denied on August 12, 1992.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a conflict among the Circuit Courts as to the proper interpretation of a very significant federal statute. The Courts of Appeal for the 3rd, 6th, 7th, 8th, and 9th Circuits, as well as the Court of Appeals for the District of Columbia, have held that a shareholder or director who controls a corporation is not an employer pursuant to 29 U.S.C. §1002(5) of the ERISA statute who is obligated to make contributions to an employee benefit plan. Only when it is appropriate pursuant to standards of corporate law to pierce the corporate veil can liability for unpaid ERISA contributions be imposed upon a dominant shareholder or officer. The District Court for the Southern District of West Virginia has held that the statutory definition of an employer is broader than the colloquial meaning of the

word. The District Court has imposed liability on corporate officers with significant ownership interests, control of the day to day aspects of the corporation's functions who have acted with respect to employee benefit funds and who personally were responsible for continuing the business despite financial adversity.

Those Courts that have held it necessary to pierce the corporate veil in order to attach liability to a controlling shareholder for unpaid ERISA contributions have differed with respect to the appropriate factors to be considered in making such a determination. Supreme Court guidance is needed in determining the balance to be established between limitations on the liability of controlling shareholders and the protections to be given to employee benefit funds governed by ERISA.

ARGUMENT

I.

THERE IS DISAGREEMENT AMONG THE LOWER COURTS AS TO WHETHER A CONTROLLING SHAREHOLDER IS AN EMPLOYER PURSUANT TO TITLE 29 U.S.C. §1002(5) AND IS PERSONALLY LIABLE FOR UNPAID CONTRIBUTIONS TO EMPLOYEE BENEFIT FUNDS

There is disagreement among the lower courts as to whether a corporate officer or controlling shareholder is personally liable as an employer pursuant to Title 29 U.S.C. §1002(5) for unpaid contributions to employee benefit funds. 29 U.S.C. §1002(5) defines an employer as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan". The question has arisen numerous times as to when and if a corporate officer, because of his actions on behalf of the corporation with respect to an employee benefits plan, can be considered an "employer" pursuant to the statute and

personally liable for unpaid ERISA contributions that the corporation has failed to make.

The first Courts considering whether a corporate officer could be considered an employee for purposes of ERISA compared the definition of an employer pursuant to ERISA to the nearly identical definition of an employer found in the Fair Labor Standards Act. Amalgamated Insurance Fund v. Danin 448 F.Supp. 1142 (D. Mass. 1986). A corporate officer exercising unilateral control over the day to day operation of a corporation may be held liable as an employer pursuant to the Fair Labor Standards Act. In Gambino v. Index Sales Corporation, 673 F.Supp. 1450 (M.D. Ill. 1987), the Court held that the definition of an employer under the ERISA statute should be given the same broad interpretation that courts have given to the definition of an employer under the

Fair Labor Standards Act.

More recently, the Courts of Appeal have found a distinction between the definition of an employer pursuant to ERISA and under the Fair Labor Standards Act. Several courts have held that there is nothing in the legislative history of ERISA to indicate that Congress intended to include corporate officers and directors as employers. Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989). In the instant case, the Court below followed the reasoning of the Court in Rockney and found no justification for defining an employer under the ERISA statute as broadly as that term has been interpreted under the Fair Labor Standards Act. The Court found that there was no indication that Congress intended to expose corporate officers and shareholders to liability for a corporations unpaid ERISA contributions. Rockney v. Blohorn, 877 F.2d 637 (8th Cir.

1989).

The Court in Rockney held that a controlling shareholder or corporate officer could only be liable for the unpaid ERISA contributions of a corporation where there were reasons to pierce the corporate veil. In so holding, the Court relied on a similar decision by the Court of Appeals for the Third Circuit in Solomon v. Klein, 770 F.2d 352 (3rd Cir. 1985), wherein the Court held that a corporate officer could be held personally liable for a corporation's unpaid ERISA contributions only where there were grounds to pierce the corporate veil. Several other Courts of Appeal have followed this line of reasoning and refused to attach personal liability to a corporate officer in the absence of facts which permit piercing the corporate veil. See Operating Engineers Pension Trust v. Reed, 726 F.2d 513 (9th Cir. 1984);

International Brotherhood of Painters and Allied Trades v. Kracher, 856 F.2d 1546 (D.C. 1988); Scarborough v. Perez, 870 F.2d 1079 (6th Cir. 1989); Plumbers Pension Fund Local 130 v. Neidrich, 891 F.2d 1297 (7th Cir. 1989).

There is a direct conflict between the line of cases cited above and the opinion of the District Court for the Southern District of West Virginia as set out in West Virginia- Ohio Valley Area IBEW Welfare Fund v. Ball Electric Company Inc., 685 F.Supp. 953 (S.D.W.Va. 1988). In Ball Electric Company, the Court noted that the Plaintiffs made no attempt to show that the controlling shareholder was the alter ego of the corporation or that there were grounds to warrant piercing the corporate veil. Rather the Court adopted the reasoning elucidated in Amalgamated Insurance Fund v. Danin, and Gambino v. Index Sales Corporation, supra. The Court

noted that while a "... corporate officer may not be an employer in the traditional sense, he may be one in statutory terms" Ball Electric Company Inc. at 955.

The definition of employer for purposes of Title 29 U.S.C. §1102(5) is borrowed from the Fair Labor Standards Act. The Court in Ball Electric Company Inc. noted that controlling shareholders have regularly been held to be employers under the Fair Labor Standards Act. The meaning of the term "employer" should be given the same effect under both statutes. In Amalgamated Insurance Fund v. Danin, supra, the Court held that Congress may be properly deemed to have recognized that the definition of an employer under ERISA would be interpreted as expansively as the nearly identical definition of employer under the Fair Labor Standards Act. A corporate officer with significant ownership interests, who had control of

significant aspects of the day to day corporate functions, who acts on behalf of the corporation with respect to the employee benefit plans and who decides to continue operations despite financial adversity when the benefit payments are sought is an employer as that term is defined in Title 29 U.S.C. §1002(5). Danin at 1147.

The conflict among the lower courts should be resolved in favor of a broad definition of those who can be considered employers under ERISA. The intent of Congress in adopting the safeguards found in ERISA for employee benefit funds was to give broad protection to such funds. The statute has been given broad application by the courts to ensure that the interests of employees, participants and their beneficiaries are protected. Smith v. C.M.T.A.-I.A.M. Pension Fund, 746 F.2d 587 (9th Cir. 1984). The legislative history

of the statute shows that Congress intended coverage under the Act "be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose." Legislative History, Public Law 83-406, p. 5854 U.S. Code Congress and Admin. News, 1974. Accordingly, the definition of an employer under ERISA should include corporate officers with significant ownership interests in the corporation who have acted for the corporation with respect to employee benefit plans and whose actions gave rise to the corporation's liabilities.

The lower Court's reliance on the decision of Rockney v. Blohorn is misplaced. In Rockney, the Court looks to what it perceives as the intent of Congress in adopting the definition of an

employer. The Court concludes that Congress never intended to disregard the limitations on shareholder liability afforded by corporate status. In relying on the legislative history, the Court ignores the plain meaning of the statutory language itself. The statute itself defines an employer as "any person acting... indirectly in the interest of an employer, in relation to an employee benefit plan". The plain language itself seems to include as employers those corporate officers who act on behalf of their employer with respect to the corporation's benefit plans. This language can hardly have any other application. This plain language approach was endorsed by Chief Judge Grady in Laborers Pension Fund v. Bakke Construction Company Inc., (N.D.Ill. 1987), (not reported in F.Supp.; 1987 W.L. 1988).

The focus should properly be upon the degree to which a corporate officer had a financial interest in and control of the corporation and acted with regard to the employee benefit plan. The dissent in Rockney noted that the a restrictive interpretation of employer under the ERISA statute does not accord with the statutory purpose of ERISA and "makes it easier for ongoing businesses to be looted". Rockney at 644, 645 Fn. 1. A broad definition should be given to the term "employer" under ERISA just as the nearly identical definition of the term has been interpreted in the Fair Labor Standards Act. A corporate officer with a significant financial interest in the corporation who assumes responsibility for the employee benefit plans of the corporation acts indirectly in the interest of the corporate employer with respect to employee benefit plans and

should thus be liable for any unpaid contributions of the corporation.

In the instant case, Russell Waldo should be held personally liable for the unpaid ERISA contributions of R. Waldo Inc. and Waldo R. Inc. Russell Waldo acted indirectly in the interest of an employer in relation to the corporation's employee benefit plan. Russell Waldo was a controlling shareholder of the corporations, he held a significant financial interest and was directly involved in the day to day activities of the corporations. Russell Waldo negotiated the Collective Bargaining Agreement between the corporation and the union which included the employee benefit plans. Finally, Russell Waldo made the various financial decisions which led to the corporation's failure to make employee benefit plan contributions. See Pipefitters Health and Welfare Trust v.

Waldo R. Inc., 872 F.2d 815 (8th Cir. 1989). The statutory protections afforded by ERISA are such as to make Russell Waldo an employer under the statute and thus personally liable for the unpaid ERISA contributions of the corporation.

II.

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT APPLIED THE WRONG STANDARD OF LAW WHEN DETERMINING WHETHER TO PIERCE THE CORPORATE VEIL AND IMPOSE PERSONAL LIABILITY ON RUSSELL WALDO FOR THE UNPAID ERISA CONTRIBUTIONS OF R. WALDO, INC. AND WALDO R., INC.

The Court of Appeals for the Eighth Circuit held that the controlling shareholder, Russell Waldo, could only be found personally liable for unpaid ERISA contributions if the facts warranted piercing the corporate veil of R. Waldo, Inc. and Waldo R., Inc. The Court of Appeals from the Eighth Circuit applied the standards for piercing the corporate veil as set out in Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 1110

(9th Cir. 1989) in deciding whether or not to pierce the corporate veil and attach personal liability to a shareholder, the Court generally looks to the amount of respect given to corporate formalities, the fraudulent intent of the incorporator and the degree of injustice visited upon the litigants that would result from recognizing the corporate form. Seymour v. Hull & Moreland Engineering, supra. In the instant case, the District Court found that the controlling shareholder respected the separate identity of the corporation and found no fraudulent intent on the part of the incorporator. Finally, the District Court correctly postulated that the Petitioners would have difficulty in collecting on judgments against the corporation but did not find that result inequitable.

The District Court and the Court of Appeals for the Eighth Circuit erred in

applying the test set out in Seymour v. Hull & Moreland Engineering, in determining whether it was appropriate to pierce the corporate veil. The factors considered in Seymour v. Hull & Moreland Engineering only reflect common law concerns about protecting the limited liability offered shareholders by the corporate form. This limited consideration is inappropriate when determining whether or not to attach personal liability to a controlling shareholder for unpaid contributions to employee benefit funds governed by ERISA. In considering the liability of a corporate officer for unpaid ERISA contributions, the interests in protecting the liability of the shareholder should be balanced against the policies underlying ERISA. Board of Trustees v. Valley Cabinet and Manufacturing Company, 677 F.2d 769 (9th Cir. 1989). Federal policies are not to

be defeated by deference to limitations on corporate liability which give sanctity to the corporate entity. United Paperworkers International Union v. Penntech Papers, Inc, 439 F.Supp. 610 (D.Me. 1977). The courts have consistently refused to give effect to the corporate form where it has been used to defeat legislative policy. Lowen v. Tower Asset Management, 829 F.2d 1209 (2nd Cir. 1987).

Many courts have applied a less strict standard for piercing the corporate veil when balancing the concern for limitations on liability against the sanctity and protection of employee benefit funds. In Amalgamated Trustees v. Danin, supra, the Court held that a corporate officer who exercises unilateral control over the day to day operations of the corporation, who has significant ownership interests, who acts on behalf of the corporation with respect to employee

benefit plans, and who continues to operate the corporation without regard for the financial adversity facing the corporation should be held personally liable for unpaid ERISA payments. This is a far different test than the one employed by the Court of Appeals for the Eighth Circuit in the instant case. This type of relaxed test for piercing the corporate veil is one in which the limitations on liability afforded by the corporate form are balanced against the need for integrity and protection of employee benefit funds governed by ERISA.

The purpose for a broad interpretation of the definition of employer and the reason for a liberal test to be applied in piercing the corporate veil is argued for by the Court of Appeals of the First Circuit in Alman v. Danin, 801 F.2d 1, 4 (1st Cir. 1986). In Alman, the Court noted that allowing the

shareholder of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable to do so in order to avoid financial obligations to employee benefit funds, would seem to be precisely the type of conduct Congress sought to avoid.

In many cases, the courts have pierced the corporate veil upon finding that the shareholders or corporate officers engaged in some improper or fraudulent conduct with respect to the employee benefit plans. In the test to determine whether to pierce the corporate veil, more emphasis has been placed on the fraudulent intent of the incorporator. In Leddy v. Standard Drywall, Inc., 875 F.2d 383 (2nd Cir. 1989), the Court held the dominant shareholder liable for unpaid ERISA contributions where the employer had engaged in a scheme to defraud the employee benefit funds of contributions by

diverting work to non-union corporations which were not obligated to pay ERISA contributions. In Lowen, supra, the Court held the controlling shareholders of a corporation liable for the corporations making improper investments with employee benefit funds. The Court held that general principles of limited shareholder liability should not afford protection where respect for the corporate form is inconsistent with ERISA's remedial nature. The Court further added that parties may not shift fiduciary obligations to one legal entity while channeling profits from self-dealing to a separate legal entity under their control.

The conduct which warranted disregard for the corporate form in Leddy and Lowen was very similar to the conduct of Russell Waldo in the instant case. The National Labor Relations Board found that R. Waldo, Inc. violated §8(a)(2) and 8(a)(3) of the

Labor Management Relations Act by executing an agreement with the Congress of International Unions at a time when both the employer and the CIU knew that all but one employee had signed dues authorization cards with the Pipefitters Union herein. The employer, through and by Russell Waldo, further interrogated employees concerning their Union sentiments and threatened employees with discharge because of their support for the Pipefitters Union herein. R. Waldo Inc., 280 N.L.R.B. No. 135, 124 L.R.R.M. 1046 (1986). Russell Waldo signed a Collective Bargaining Agreement obligating Waldo R. Inc. to pay wages and make contributions to employee benefit funds as set out in the Collective Bargaining Agreement. At the same time Russell Waldo diverted work from Waldo R. Inc. to R. Waldo Inc and failed to pay those employees the wages and benefits to which they were entitled

to. In Pepper v. Litton, 308 U.S. 295, note 28, the Court held that "in all the experience of the law, there has never been a more prolific breeder of fraud than the one man corporation." This was never more true than with Russell Waldo and Waldo, R. Inc.

The purpose and effect of these actions were to avoid the employer's obligation to make ERISA contributions pursuant to its agreement with the Petitioners. This issue was resolved in Petitioner's favor by the NLRB. The conduct of Russell Waldo on behalf of the corporations with respect to the employee benefit plans was similar to the conduct of those corporate officers in Leddy and Lowen. The actions of the dominant shareholder and corporate officer to defraud the employee benefit funds of contributions warrant disregard of the corporate form in this instance and the

imposition of personal liability for the unpaid ERISA contributions on Russell Waldo. Imposing personal liability on Russell Waldo in the instant case is in keeping with the remedial nature of ERISA and insures integrity and protection for employee benefit funds.

CONCLUSION

In order to resolve a dispute among the lower federal courts of importance to the public, to give proper protection to employee benefit funds, and for the other reasons set forth herein, this Petition for Certiorari should be granted.

Respectfully submitted,

BARTLEY, GOFFSTEIN, BOLLATO AND LANGE

/S/

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DATED: November 6, 1992

APPENDICES TO PETITION FOR CERTIORARI

APPENDIX A

Order Denying Rehearing

(United States Court of Appeals
- Eight Circuit)

(Dated August 12, 1992)

(Pipefitters Health and Welfare Trust, et al., Appellants, vs. Russell Waldo, Appellee - No. 91-3063EMSL; Appeal form the United States District Court for the Eastern District of Missouri)

The Petition for rehearing by the panel is denied.

April 12, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

OPINION AND JUDGMENT

U. S. Court of Appeals- Eighth Circuit

(Submitted March 12, 1992)

(Filed July 16, 1992)

(Pipefitters Health and Welfare Trust; Pipefitters Pension Trust; Pipe Fitters Pension Trust; Pipe Fitters Local Union No. 562; John Marshall, Administrator and Fiduciary of all plaintiff funds; Lester Gross, Joe Barry, Don Devitt, Robert McDonald, Trustees, Appellants, vs. Waldo, R.. Inc.; R. Waldo, Inc. and Russell Waldo, Appellees - No. 91-3063; Appeal from the United States District Court for the Eastern District of Missouri)
Before Fagg, Circuit Judge, BEAM, Circuit Judge, and Battey*, District Judge.

BEAM, Circuit Judge.

* The Honorable Richard H. Battey, United States District Judge for the District of South Dakota, sitting by designation.

Pipe Fitters Health and Welfare Trust, Pipe Fitters Pension Trust, Pipe Fitters Local Union No. 562, and various fund administrators and trustees (collectively "Pipefitters") appeal from the district court's decision refusing to pierce the corporate veil of R. Waldo, Inc. and Waldo, R., Inc. and hold Russell Waldo personally liable for lost wages, pension payments, health and welfare payments, initiation fees, and union dues under the Employee Retirement Security Act of 1974 ("ERISA") and the Labor Management Relations Act. We affirm.

I. BACKGROUND

Pipefitters brought this action in 1984 against Russell Waldo, individually, and R. Waldo, Inc., and Waldo, R., Inc., two companies owned by Russell Waldo. Both companies operated as contractors for plumbing, heating, air conditioning, and

other related work. R. Waldo was the first company formed. "[F]or several years [R. Waldo had] negotiated collective bargaining agreements with the Congress of Independent Unions (CIU) covering all of the company's employees." Pipe Fitters Health & Welfare Trust v. Waldo, R., Inc., 872 F.2d 815, 816 (8th Cir.), cert. denied, 493 U.S. 977 (1989). In 1982, however, a representative of Pipe Fitters Local Union No. 562 ("Local 562"), a rival of CIU, contacted some R. Waldo employees and discussed the possibility of the employees and discussed the possibility of the employees becoming members of Local 562. (Local 562's wage rate was considerable higher than CIU's.) Later, another Local 562 representative, James O'Mara, contacted Russell Waldo. After negotiation, Russell Waldo agreed to form a separate corporation, Waldo, R., "for the purpose of signing a collective bargaining agreement with Local 562."

Pipe Fitters v. Waldo, R., No. 84-2163 C (2), Memorandum at 2 (E.D. Mo. July 14, 1987).

Waldo, R. having been formed and a bargaining agreement signed, Russell Waldo "then transferred eight of his employees to Waldo, R. [and] promised O'Mara and the remaining employees [at R. Waldo] that he would phase out R. Waldo operations as the work bid by that company was completed, and its employees could join [Local 562] when [R. Waldo's] CIU agreement expired." Pipe Fitters, 872 F.2d at 816. "[Russell] Waldo, however, did not run the two construction companies as he had promised. Waldo, R. never bid on any projects and never had any work other than what it subcontracted from R. Waldo." Id. In 1983, Local 562 renewed its contract with Waldo, R. This renewed contract "contained provisions for direct payment to the union of initiation fees, dues and assessments, and for contributions to an

employee health and welfare trust fund and pension fund." Id. at 816-817. Then, in 1984, Russell Waldo renewed R. Waldo's CIU contract "[e]ven though the R. Waldo employees unanimously voted against CIU representation." Id. at 817. "This contract was never ratified by R. Waldo employees" and, after Local 562 brought a charge of unfair labor practices, "[t]he NLRB found that [Russell] Waldo had engaged in unfair labor practices by renewing the CIU contract after the CIU ha[d] lost its majority support, by unlawfully coercing and discriminating against employees and be giving unlawful support to the CIU." Id.

"Meanwhile, Pipefitters brought this action in federal district court in an attempt to hold Waldo, R., R. Waldo, and Russell Waldo, individually, liable for violations of the [Local 562] contract." Id. Pipefitters alleged a loss of $90,000 in union wages as a result of Waldo, R.

diverting its work to the R. Waldo employees. Pipefitters also alleged that the work diversion resulted in a loss of pension payments, health and welfare payments, initiation fees, and union dues, totalling approximately $80,000. Id. The district court, however, refused to enforce Local 562's contract, holding that Russell "Waldo was running a double-breasted operation and that Waldo, R. was the alter ego of R. Waldo." The district court also held that Local 562's "contract was illegal as on employer may not negotiate a collective bargaining agreement with another union when its employees are already represented by a union." Id.

On appeal, we reversed the decision of the district court, holding that it was "directly contrary to the findings of the [NLRB]" and "that the existence of the CIU contract did not preclude [Russell] Waldo from operating a split shop and from

entering into a prehire agreement with [Local 562] covering the construction workers employed by Waldo R." Id. We did not, however decide the issue of whether Russell Waldo could be held personally liable for the contractual obligations of R. Waldo and Waldo, R. Id. at 820. We remanded this case to the district court to determine whether any money was owed to Pipefitters and, if so, to resolve this issue of Russell Waldo's individual liability.

In May 1991, the district court issued a memorandum opinion deciding that R. Waldo and Waldo, R. are liable to Pipefitters in the total amount of $741,189 and that Russell Waldo could not be held personally liable for the debts of his corporations. The district court, citing Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 1110-11 (9th Cir. 1979), looked to three factors in its analysis of Russell Waldo's personally

liability: (1) the degree of respect that the shareholder gave to the separate identity of the corporation; (2) the incorporator's fraudulent intent, if any; and (3) the degree of injustice that the plaintiffs would suffer if the corporate entity was recognized. See Pipe Fitters v. Waldo, R., No. 84-2163 C (2), Memorandum Opinion at 7 (E.D. Mo. May 10, 1991).

The district court concluded, with respect to the first factor, that although Waldo, R. was the alter ego of R. Waldo, Russell Waldo had shown a proper degree of respect for corporate formalities. R. Waldo, for example, had "maintained separate corporate records, the board of directors met annually, and, on occasion, the board of directors held special meetings to authorize the president of the company, Russell Waldo, to proceed on a particular matter." Id. at 8. Although Pipefitters "tried to establish that Waldo

commingled his personal funds with those of the corporations and that he treated corporate assets as his own," the district court concluded that Pipefitters "failed in their proof." Id.

In its consideration of the second factor, the district court concluded that there was no evidence of bad faith or fraudulent intent by Russell Waldo in forming the corporations: "R. Waldo was an ongoing business which appears to have been adequately capitalized at the outset. Waldo[,] R. was created in good faith for the purpose of bidding on projects which required an AFL-CIO union work force." Id. at 9. Finally, applying the third factor, the district court acknowledged that Pipefitters "might have trouble collecting the judgment" against Waldo, R. and R. Waldo (both of which have since gone out of business), but concluded that "that alone does not constitute an inequitable result." Id. at 10.

On appeal, Pipefitters argues that because Congress intended ERISA to be construed liberally to protect workers, Russell Waldo should be personally liable for his corporation's failure to make ERISA contributions, despite the protection of the corporate entity. Pipefitters also argues that, if Russell Waldo can only be held liable by piercing the corporate veil, the standard for determining when to disregard the veil of incorporation should be less onerous when the action is for failure to make ERISA contributions. Finally, Pipefitters claims that the district court's decision that Russell Waldo is not liable for wages and fringe benefits is clearly erroneous.

II. DISCUSSION

Our resolution of the issues raised by Pipefitters requires far less space than our summary of the background leading

up to this appeal. Pipefitters' general argument that corporate was decided by this court in Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989). In Rockney, we held that "corporate officers cannot be held personally liable under ERISA where there is no basis for piercing the corporate veil." Id. at 643. We have no authority to overrule Rockney. Moreover, Pipefitters' simple assertion that the legislative history of ERISA generally supports a liberal construction of the Act is no argument when considered under our thorough analysis in Rockney. See id. at 639-43.

Likewise, we do not agree with Pipefitters that a less onerous standard for piercing the corporate veil should be applied, Pipefitters, again, argues that the general legislative intent to construe ERISA liberally supports this notion, and that a less onerous standard is particularly appropriate in a case, such

as this, where the sole shareholder and corporate officer exercises substantial control over the business. As we explained in Rockney, if Congress intended to expose corporate officers to personal liability for violations of ERISA beyond the usual limits, "'it would have signaled that resolve somehow in legislative history.'" Id. at 642 (quoting International Brotherhood of Painters and Allied Trades Union v. Kracher, 856 F.2d 1546, 1548 (D.C. Cir. 1988). In passing ERISA, Congress gave no indication -- in either the statutory language or legislative history -- that it "intend[ed] to abrogate the long[-]established corporate principle of limited liability," and we will not treat ERISA as if it had. Id.

Finally, we disagree with Pipefitters that the district court's decision to not pierce the corporate veil of R. Waldo and Waldo, R. is clearly erroneous. Pipefitters argues a number of points in

this brief, but none of these arguments -- most of which were addressed by the district court in its memorandum opinion -- convince us that the district court abused its discretion.[1] Pipefitters' primary point of contention seems to be that R. Waldo sold land valued at $95,708 to Russell Waldo in 1983 in exchange for 71 shares of R. Waldo stock. Because Russell Waldo later sold the same land (in 1986) for $550,000, Pipefitters argues this is evidence that Russell Waldo had no respect for the separate identity of the corporate entity and that he operated the corporation fraudulently and with bad

[1]In addition to the factual points, Pipefitters argues that the district court erred in relying on the test in Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 1110-11 (9th Cir. 1979), for piercing the corporate veil, rather than the test under the Missouri law. See e.g., Fairbanks v. Chambers, 655 S.W.2d 33, 36-37 (Mo. App. 1984). We agree, however, with the district court's conclusion that "the result under the Missouri law would be the same." Memorandum Opinion at 7 n.6.

faith. We disagree. The land transaction was approved by R. Waldo's board of directors and, as the district court explained, "[t]he land transaction in question not only occurred before this suit was filed, it also occurred before a formal complaint was issued against 'Waldo Construction' by the National Labor Relations Board." Memorandum Opinion at 9.

III. CONCLUSION

For the reasons stated above, the decision of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

MEMORANDUM OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PIPE FITTERS HEALTH & WELFARE TRUST, PIPE FITTERS PENSION TRUST, and PIPE FITTERS LOCAL UNION NO. 562,	)	
Plaintiffs,	)	No. 84-2163(c)
v.	)	
WALDO R., INC., R. WALDO, INC. and RUSSELL WALDO, Individually,	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on a mandate from the United States Court of Appeals for the Eighth Circuit.

The facts of this case are set out in detail in **Pipefitters Health & Welfare**

Trust v. Waldo R., Inc., 872 F.2d 815 (8th Cir. 1989). The court of appeals agreed with this Court's conclusion that Waldo R. became the alter ego of R. Waldo; however, the appeals court decided that Russell Waldo could not assert the alter ego doctrine to avoid his contractual obligation. Therefore, this Court's decision of July 14, 1987, was reversed and the case remanded. The court of appeals wrote:

> R. Waldo, Inc. became bound by the terms of the Pipefitters [plaintiffs] contract upon the expiration of the CIU [Congress of Independent Unions] agreement on April 15, 1984. R. Waldo's employees expected this to occur and the NLRB found that Russell Waldo had promised to be so bound. Thus, any of Waldo's employees performing pipefitting or plumbing work after that date should have been paid union wages. Payments to the union trust funds should also have been made, regardless of whether the employees were members of the Pipefitters union.

Id. at 819-20.

The court of appeals did not decide the issue of whether Russell Waldo could be held personally liable for the contractual obligations of R. Waldo and Waldo R. Therefore, this court must now decide two questions; first, as a result of the decision of the court of appeals, how much money, if any, is owed to plaintiffs; and, if so, should Russell Waldo be held personally liable for the contractual obligations of the companies.

After the first trial, the parties stipulated to the following hours of "pipefitting worked by R. Waldo, Inc. employees for which hours were not paid at the local 562 wage rate and for which fringe benefit rates were not paid to plaintiff union or funds":[1]

[1]The original stipulation covered hours from October 1, 1982, to March 31, 1986.

TIME PERIOD	HOURS
April 15, 1984 - May 31, 1984	2,912.40[2]
June 1, 1984 - Dec. 31, 1984	4,654.75
Jan. 1, 1985 - May 31, 1985	5,152.75
June 1, 1985 - Dec. 31, 1985	10,946.75
Jan. 1, 1986 - March 31, 1986	2,338.00

Defendants now argue that the stipulation should not be used because there is no breakdown of the work as to laborers, electricians, or other trades and because plaintiffs elicited no evidence as to which employees are entitled to the difference between Local 562 wages and C.I.U. wages.

As to the first argument, the Court has reviewed the transcript of Shirley Steele's testimony. Steele was the bookkeeper of R. Waldo, Inc. She testified concerning the total hours of

[2]The parties originally stipulated to the period from January 1, 1984, to May 31, 1984 (9708 hours). Since the court of appeals decision neither party has indicated how many of those hours were for the period from April 15, 1984 to May 31, 1984; however, the parties have agreed that a pro rata computation should be utilized.

pipefitting worked by employees of R. Waldo, Inc. As Steele was going through her figures, the Court questioned her concerning supporting documentation. She advised the Court that she had some of the documents with her and the rest could easily be obtained. After a fifteen minute break, defense counsel informed the Court that the parties could stipulate to the hours in question. It was the Court's understanding that the stipulation would cover pipefitters and it could be used to determine hours lost under the Pipefitters' contract. That understanding is supported by a plain reading of the stipulation.

The Court does not have to reach defendant's argument that plaintiffs do not have standing to sue for wages here because implicit in the court of appeals' decision is a finding that plaintiffs have

standing to recover the wages in question.[3] Id. at 819-20.

Plaintiffs have provided an exhibit calculating the damages, liquidated damages, wages due and attorney fees.[4] See 29 U.S.C. §1132(g)(2). The only information contained in the exhibit which was disputed by defendants were the figures used for "hours" worked. Having decided that defendant's objection to the stipulation on "hours" is without merit, the Court now finds that plaintiffs' exhibit properly reflected how much money

[3]The issue of "associational standing" was briefed before the court of appeals.

[4]Originally, plaintiffs agreed to waive their claim for the full amount of lost wages; however, in response to defense counsel's decision to reserve his right to contest wages due, the plaintiffs now seek the full amount of lost wages on behalf of its members and not just the difference between the labor rates paid to the CIU employees and the Pipefitters rate. The court has decided that defendants must abide by their stipulation. Likewise, plaintiffs must abide by their decision to waive their claim for the full amount of lost wages.

was due under the Pipefitters' contract through July 15, 1990. The figures, as expressed below, have been adjusted to reflect money owed through the date of judgment. As to attorneys fees, it was stipulated to at the time of the first trial that $50,000.00 in attorneys fees was fair and reasonable. Plaintiffs' counsel has submitted an affidavit in which he indicates that since the time of the trial, an additional 400 hours of plaintiffs' legal counsel's professional services were required to process this matter through several judiciary proceedings before this Court, the Eighth Circuit, and the United States Supreme Court. The parties agree that the additional 400 hours of legal time were necessary, and the amount charged per hour was customary to this geographical area. The Court finds that an additional $40,000 in attorneys fees requested is fair and reasonable.

CALCULATION OF DAMAGES

Period	Hours	Rate	Amount
4/15/84 to 5/31/84	2,912.40	$5.255	$15,304.66
6/1/84 to 12/31/84	4,654.75	$5.655	$26,322.61
1/1/85 to 5/31/85	5,152.75	$5.655	$29,138.80
6/1/85 to 12/31/85	10,946.75	$6.155	$67,377.25
1/1/86 to 3/31/86	2,338.00	$6.155	$14,390.39
Total April 15, 1984 to May 31, 1986:			$152,533.71

Liquidated Damages Through May 15, 1991, on Unpaid Health & Welfare and Pension Funds Contributions

Period	Amount	Months Delinquent	2% per Month	Liquidated Damages
4/15/84 to 5/31/84	$15,305	86	$26,325	$17,200
6/1/84 to 12/31/84	$26,323	80	$42,117	$22,400
1/1/85 to 5/31/85	$29,139	74	$43,126	$14,800
6/1/85 to 12/31/85	$67,377	68	$91,633	$19,040
1/1/86	$14,390	62	$17,844	$12,400
			$221,045	$85,480

C. **Wages Due**

Period	Difference Between Hourly Rate of Pipefitters and CIU	Hours	Amount
1/15/84 to 5/31/84	$6.42	2,912.00	$18,698
6/1/84 to 12/31/84	$7.42	4,654.75	$34,538
1/1/85 to 5/31/85	$6.92	5,152.75	$35,657
6/1/85 to 12/31/85	$7.92	10,946.75	$86,698
1/1/86 to 3/31/86	$6.92	2,338.00	$16,179
Total April 15, 1984, to March 31, 1986:			$191,770

Total Amounts Owing:

Contributions to Funds:	$152,534
Interest and Liquidated Damages:	$306,885
Wages Deferential:	$191,770
	$651,189
Attorneys fees as per Affidavit $50,000 stipulation; 400 x $100 @ hour= $40,000:	$90,000
	$741,189

Plaintiffs seek to hold Russell Waldo individually liable for the amount due under the Pipefitters' contract because of Waldo's "self dealing with the corporate entities," complete commingling of corporate and individual assets," and "utter disregard for the corporate form or practice." Additionally, plaintiffs assert that Russell Waldo should be held individually now operates the remaining shell of the company business out of his home."

Corporate officers cannot be held personally liable under ERISA where there is no basis for piercing the corporate veil.[5] **Rockney v. Blohorn**, 877 F.2d 637 (8th Cir. 1989). In considering whether

[5]Several courts have held that corporate offices or stockholders could be personally liable under the Employee Retirement Income Security Act of 1974, even though it would be inappropriate to pierce the corporate veil. See e.g., **Gambino v. Index Sales Corp.**, 673 F.Supp. 1450, 1456 (N.D.Ill. 1987); **Trustees of Amalgamated Ins. Fund v. Danin**, 648 F.Supp. 1142, 1147 (D.Mass. 1986).

to disregard the corporate form in actions to recover fringe benefit fund payments, the Court applies federal substantive law, although it may look to state law for guidance. **Laborers Clean-up Contract Admin. Trust Fund v. Uriarte Clean-up Service, Inc.**, 736 F.2d 516, 523 (9th Cir. 1984). To determine whether Russell Waldo should be held personally liable for the debts of the corporation, the courts looks to three general factors: the amount of respect given to the separate identity of the corporation by its shareholders, the fraudulent intent of the incorporator, and the degree of injustice visited on the litigants by recognition of the corporate entity.[6] **Seymour v. Hull & Moreland**

[6]"Reliance on state corporate law is proper if consistent with the federal policy of uniform interpretation and enforcement of collective bargaining agreements." **Seymour v. Hull & Moreland Engineering**, 605 F.2d 1105, 1110 (9th Cir. 1979). Because federal law provides ample guidance on this matter, the Court has looked to it in deciding this matter; however, the result under Missouri law

Engineering, 605 F.2d 1105, 1110-1111 (9th Cir. 1979).

The Court has already decided that Waldo R. was the alter ego of R. Waldo. Therefore, in deciding whether to pierce the corporate veil to hold Waldo individually liable, the Court, in applying the factors discussed in **Seymour**, focuses on Waldo's relationship with the corporations, not the relationship of the corporations with one another. With this in mind, the court finds that the corporate formalities were properly observed. Among other things, R. Waldo

would be the same. Under Missouri law, the corporate entity may be disregarded if it is controlled and influenced by one or a few persons and the evidence establishes that the corporate cloak was used as "a subterfuge to defeat public convenience, to justify wrong or to perpetuate fraud." **Fairbanks v. Chambers**, 665 S.W.2d 33, 37 (Mo.App. 1984). Under the facts presented here, the Court would not pierce the corporate veil under the Missouri law. Although Waldo controlled and influenced the corporations in question, the corporate cloak was not used as a subterfuge.

maintained separate corporate records, the board of directors met annually, and, on occasion, the board of directors held special meetings to authorize the president of the company, Russell Waldo, to proceed on a particular matter. For example, on August 1, 1986, the board of directors held a special meeting and decided to sell the assets of the corporation. Waldo, as president of the corporation, was authorized to conduct the negotiations and execute all sale agreements. Additionally, although plaintiffs tried to establish that Waldo commingled his personal funds with those of the corporations and that he treated corporate assets as his own, they failed in their proof. Given the above, the Court finds that Waldo showed respect for corporate formalities.

As to the second prong of **Seymour**, there is no evidence of bad faith or fraudulent intent in the forming of the

corporations. R. Waldo was an ongoing business which appears to have been adequately capitalized at the outset. Waldo R. was treated in good faith for the purpose of bidding on projects which required an AFL-CIO union work force. Nonetheless, the plaintiffs ask this Court to infer bad faith towards the union based on a land transaction which occurred in December of 1983 and on the fact that the corporate assets have now been sold off. The land in question was sold to Russell Waldo and so were many of the assets of the corporations. See International Union v. Cardwell Manufacturing Co., 416 F.Supp. 1267 (D.C.Kan. 1976) (parent corporation held liable for contributing to fringe benefit funds owed by a subsidiary corporation).

On September 30, 1982, the board of directors of R. Waldo, Inc., agreed to sell Russell Waldo a tract of land with the legal description of Alpha Industrial

Park for 71 shares of R. Waldo, Inc., stock. The value of the land was estimated at $95,708. The property was actually transferred in December of 1983, but the transaction remained unrecorded until August 28, 1985. In November of 1986, Mr. and Mrs. Waldo sold the property to Sieveking, Inc. for $550,000. The land transaction in question not only occurred before this suit was filed, it also occurred before a formal complaint was issues against "Waldo Construction" by the National Labor Relations Board. Under these facts, the Court will not infer bad faith. Likewise, the Court will not assume that Waldo ceased operating the corporations for an improper purpose. The Court finds credible Waldo's testimony that he ceased operating the businesses because of his health and because they were no longer profitable.

Finally, although plaintiffs might have trouble collecting the judgement to

be entered contemporaneously with this memorandum opinion, that alone does not constitute an inequitable result. The evidence establishes that Waldo created two corporations in good faith and abided by the corporate form. Additionally, plaintiffs have not convinced this Court that Waldo fraudulently drained the corporate assets. Under the circumstances, the Court will enter judgment in favor of Waldo individually and impose joint and several liability against Waldo, R. and R. Waldo.

Dated this 10th day of May, 1991.

EDWARD FILIPPINE

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX D

TITLE 29 USC §1002(5)

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association acting for an employer is such capacity.

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Supreme Court, U.S.
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No. 92-911

In the Supreme Court of the United States

October Term, 1992

**PIPEFITTERS PENSION TRUST;
PIPEFITTERS LOCAL UNION NO. 562;
JOHN MARSHAL, administrator and
fiduciary of all plaintiff funds;
LESTER GROSS, JOE BARRY, DON DEVITT,
ROBERT MCDONALD, trustees,**

Petitioners,

v.

RUSSELL WALDO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent's Brief in Opposition

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December 18, 1992

QUESTIONS PRESENTED

I

WHETHER A DOMINANT SHAREHOLDER IS PERSONALLY LIABLE FOR A CORPORATIONS FAILURE TO MAKE EMPLOYEE BENEFIT CONTRIBUTIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED (ERISA).

II

WHETHER THE RESPONDENT, AS DOMINANT SHAREHOLDER, IS PERSONALLY LIABLE FOR SUCH EMPLOYEE BENEFITS UNDER ANY OTHER STANDARDS, OR FOR HIS OWN PERSONAL ACTS.

LIST OF PARTIES

Respondent adopts Petitioners' List of Parties.

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NO. 92-911

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PIPEFITTERS HEALTH AND WELFARE TRUST;
PIPEFITTERS PENSION TRUST;
PIPEFITTERS LOCAL UNION NO. 562;
JOHN MARSHALL, ADMINISTRATOR AND
FIDUCIARY OF ALL PLAINTIFF FUNDS;
LESTER GROSS, JOE BARRY, DON DEVITT,
ROBERT MCDONALD, TRUSTEES

Petitioners,

v.

RUSSELL WALDO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Respondent adopts and incorporates herein Petitioners' Jurisdictional Statement.

CORRECTIONS TO PETITIONERS' BRIEF

The opinion of the Court of Appeals is correctly reprinted in Appendix B of the Petitioners' Brief. The opinion of the Eighth Circuit is incorrectly cited as 872 F.2d 815 (8th Cir. 1989); it is actually reported at 969 F.2d 718 (8th Cir. 1992).

Other corrections to the Petitioners' Brief are as follows:

Pg. iv: Amalgamated Insurance Fund v. Danin, 648 F.Supp. 1142 (D.Mass. 1986) is incorrectly cited as 448 F.Supp 1142 and is cited incorrectly in the balance of the text, the pages of which are also misnumbered.

Pg. 13: Gambino V. Index Sales Corporation, 673 F.Supp. 1450 (N.D. Ill. 1987) is incorrectly cited as the M.D. Ill.

Pg. 19: Legislative History, Public Law 93-406, p. 4854 U.S. Code Congress and Admin. News, 1974 is incorrectly cited as Legislative History, Public Law 83-406, p. 5854 U.S. Code Congress and Admin. News, 1974.

STATEMENT OF THE CASE

Respondents adopt Petitioners' Statement of the Case insofar as the sequence of litigation is concerned and of the facts, generally.

However, it should be emphasized that the formation of the second corporation was at the instigation of Petitioning union and not that of R. Waldo, Inc. or Respondent Russell Waldo. Also, Petitioners' Statement

of the Case glosses over the fact that the District Court entered a final judgment after a trial and not after a ruling on motions to dismiss or summary judgment.

The evidence offered is sufficient that the corporate structure was observed, that no wrong-doing occurred, and that the District Court's analysis of the evidence before it was not an abuse of discretion nor clearly erroneous.

REASONS FOR DENYING THE WRIT

The respondent contends as follows:

1. There are no significant differences in results obtained in the various circuits, and only modest differences in the language utilized.

2. That if there is a difference in standards, this case is inappropriate to determine those differences because the

facts, as determined by the District Court and affirmed by the Court of Appeals, would meet the standards of any of the various Courts of Appeals that have addressed this issue.

ARGUMENT

I.

THERE IS NO DISAGREEMENT AMONG THE COURTS OF APPEAL AS TO WHETHER A CONTROLLING SHAREHOLDER IS AN EMPLOYER PURSUANT TO TITLE 29 U.S.C. § 1002(5) AND IS PERSONALLY LIABLE FOR UNPAID CONTRIBUTIONS TO EMPLOYEE BENEFIT FUNDS

A Petition for a Writ of Certiorari should only be reviewed by the Supreme Court if jurisdiction is found under the rules of the Supreme Court of the United States. In this case, Rule 10 applies to the Petitioners' Petition for Writ of

Certiorari. It appears that Petitioners are attempting to show a disagreement among the lower federal courts and thus comply with the requirements of Rule 10.1(a). The Petitioners fail in this attempt due to the dictates of Rule 10.1(a):

> **When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so departed from the accepted and usual course of judicial proceedings, or so sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.**

Rule 10.1(a), Rules of the Supreme Court of the United States.

Throughout Petitioners' argument there has been no inference of a Court of Appeals which has decided the issue at hand in a manner conflicting with any other Court of Appeals decision. The only standing decision that conflicts with the decision of the Eighth Circuit in the current case is that of West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Company, Inc., 685 F.Supp. 953 (S.D.W.Va. 1988). This is a decision of a District Court and as such does not meet the requirements of Rule 10.1(a). There is no indication by the Petitioners that any Courts of Appeals has reached a conflicting opinion with that of the Eighth Circuit. In fact, Petitioners state five other circuits that are in harmony with the Eighth Circuit. Operating Engineers Pension Trust v. Reed, 726 F.2d 513 (9th Cir. 1984); Solomon v. Klein, 770

F.2d 352 (3rd Cir. 1985); International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988); Scarbrough v. Perez, 870 F.2d 1079 (6th Cir. 1989); Plumbers' Pension Fund, Local 130 v. Neidrich, 891 F.2d 1297 (7th Cir. 1989). The First Circuit has also viewed this issue and reached the same decision as the other circuits. Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988).

Petitioners also cite two other District Courts as finding a conflict between courts. Both decisions are used as the underpinnings of the Ball Electric case. Amalgamated Insurance Fund v. Danin 648 F.Supp. 1142 (D.Mass. 1986) and Gambino v. Index Sales Corporation, 673 F.Supp. 1450 (N.D.Ill. 1987). Neither decision has been

followed by their respective Circuit Courts of Appeal, in fact, they have been de facto overruled. Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988) and Plumbers' Pension Fund, Local 130 v. Niedrich, 891 F.2d 1297 (7th Cir. 1989).

In fact, Petitioners even cite a non-reported case from the Northern District of Illinois, which merely endorses a plain meaning approach. Laborers' Pension Fund v. Bakke Construction Company, Inc., (N.D.Ill. 1987), (not reported in F.Supp.; 1987 W.L. 1988). Yet the Seventh Circuit has clearly and consistently ruled in agreement with the Eighth Circuit. Plumbers' Pension Fund, Local 130 v. Niedrich, 891 F.2d 1297 (7th Cir. 1989), Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989).

Petitioners state that ERISA is given broad application to protect workers, yet the only cited circuit opinion relates purely and exclusively to the issue of attorney's fees in ERISA actions. Smith v. C.M.T.A.-I.A.M. Pension Fund, 746 F.2d 587 (9th Cir. 1984). Yet even the Petitioners admit, as they must, that this same Circuit, the Ninth, is in accord with the Eighth Circuit on the issue at hand. Operating Engineers' Pension Trust v. Reed, 726 F.2d 513 (9th Cir. 1984).

There is no conflict among the Eleven Circuits and as such the Petitioners fail to comply with Rule 10 and therefore the Petitioners Petition for Writ of Certiorari should be denied.

II.

THERE IS NO IMPORTANT ISSUE OF FEDERAL LAW

TO BE DECIDED AND FAIR AND EQUITABLE TESTS HAVE BEEN DEVELOPED AMONG THE CIRCUITS AND THE RESULTS WOULD HAVE BEEN THE SAME UNDER A MORE EXPANSIVE STANDARD.

The other avénue that may allow the Petition for Writ of Certiorari to be granted stems from Rule 10.1(c):

> **When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.**

Rule 10.1(c), Rules of the Supreme Court of the United States.

Though there is no conflict with prior decisions of the Supreme Court there is always the attempt to have the Supreme Court

rule on a federal issue. In this case the Circuits are in accord. There is no need for the Supreme Court to decide this issue as the Courts of Appeals have established fair and equitable tests that fully comport with the language and intent of the Employee Retirement Income Security Act, 29 U.S.C. 1001 et seq. Even under the liberal view of the First Circuit, with its assumption that a shareholder is an employer with regards to 29 U.S.C. 1002(5), Mr. Waldo "is not an 'employer ... obligated to make contributions to an employee welfare plan.' Consequently, ERISA does not impose upon him the federal duty to make such contributions." Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23,25 (1st Cir. 1988) quoting Alman v. George Manufacturing Corporation, 680 F.Supp. 56,57 (D.Mass.

1988):

> For one thing, the statute's language quite clearly states that the duty in § 1145 arises only in respect to employers "obligated" to make the contributions. Although Starrett's corporation may have been obligated to make the contributions, Starrett personally was not. For another thing, the legislative history of § 1145 indicates that the language means what it says. When Congress enacted the provisions in 1980, the Senate Committee on Labor described it as follows:
>
> > The public policy of this legislation ... mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill

> imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer (sic) plans.
>
> Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration 44 (Comm.Print 1980)(emphasis added).

"Massachusetts Laborers'" at p.25. This line of reasoning has been followed by the Seventh Circuit:

> In Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989) ... we were required to determine whether a corporate officer could be held personally liable for a corporation's pension contributions in

the absence of a contract personally binding to these obligations. In resolving this question we turned to Section 515 of ERISA, 29 U.S.C. §1145 that requires '[e]very employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement [to] make such contributions in accordance with the terms and conditions of such plan or such agreement.' We stated that under Section 515:

> 'Only "an employer <u>who is obligated to make contributions</u> to" a plan under an agreement need to so. Such an employer must make contributions "in accordance with the terms and conditions of such plan or such

agreement." Even if a manager or other officer is an "employer" under §3(5) [of ERISA), the plan or other agreement still governs what each must do, for not all "employers" are "obligated to make contributions" under the "terms and conditions" of a plan or agreement. [Central States Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148 (7th Cir. 1989) (en banc)] holds that these documents will be strictly enforced. Exactitude works both ways. Just as pension and welfare funds get no less than the agreements provide, so they get no more ... Several plans obtained Richard Deprizio's [the corporate officer] personal

> **commitment, as co-maker of notes with Deprizio Co.'s commitment to pay. Section 515 requires us to honor the difference between these engagements.'**
>
> **Levit, 874 F.2d at 1193 (emphasis added).**

Plumbers' Pension Fund, Local 130 v. Niedrich, 891 F.2d 1297,1300 (7th Cir. 1989).

These cases show the most expansive reading of the applicable ERISA sections. Other circuits have found that personal liability only applies when the corporate veil can be pierced. Scarbrough v. Perez, 870 F.2d 1079 (6th Cir. 1989). "Limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in

the legislative history." International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546,1550 (D.C. Cir. 1988).

> Moreover, we find nothing in the legislative history to indicate that Congress intended to impose a personal liability on a shareholder or a high-ranking officer of a corporation for ERISA contributions owed by the corporation. Appellants rely primarily on the analysis in Massachusetts State Carpenters Pension Fund v. Atlantic Diving Co., Civ. No. 83-2872 (D.Mass. October 12, 1984). We are not impressed by the Massachusetts district court's analysis. It relied not on the interpretation of the ERISA statute but on the Fair Labor Standards Act

and precedents of the First Circuit.

> **The method of analogy is, of course, a legitimate method of reaching a decision. But in matters of statutory construction of ERISA our responsibility is to ascertain the intention of Congress in ERISA and not its intention in enacting a separate federal statute.**

Solomon v. Klein, 770 F.2d 352,354-5 (3rd Cir. 1985). The Ninth Circuit has also reached a similar decision. Operating Engineers Pension Trust v. Reed, 726 F.2d 513 (9th Cir. 1984).

Regardless of which Circuits' view is applied, the result, in this case, would be the same. There is no need for the Court to address this issue under Rule 10.1(c). The courts of appeals have sufficiently covered this issue and the result in the case at

hand would not be changed by any other circuit.

CONCLUSION

The Petition for Writ of Certiorari should be denied because there is no substantial difference between the circuits, there is no federal issue raised in substance, and that the facts of this case are inappropriate to resolve differences between the circuits, if there were any. No difference in result would obtain even by the imposition of the standards suggested by Petitioners since there was nothing signed or promised by Respondent Russell Waldo. Neither were there any culpable acts on his part and these findings were made by the District Court based upon the evidence.

Petitioners ask the Court to rule on an abstract proposition of law which does not

relate, nor is in accord with, the facts as found by the District Court, after evidentiary hearing, and affirmed by the Court of Appeals as, in accordance with the standard of review, agreed by Petitioners, as not "clearly erroneous."

Surely this is not worthy of certiorari.

This case is not worthy of further review because under the facts, the Supreme Court would have to conclude that corporate officers, directors and shareholders of small corporations were always responsible personally for the act of the corporations, irrespective of individual culpability. In short, the Court would have to hold that the individual is personally responsible for any error of judgment. That is not the rule of any court.

A principal complaint by Petitioners at

both the District Court and at the Court of Appeals involved a transfer of real property. The District Court found there was nothing improper about this transfer (Petitioners' Appendix B). However, if Petitioners contend that there were other transfers, the appropriate remedy is to pursue execution through the District Court. Instead the Petitioners have requested the Court of Appeals, and now the Supreme Court, to do for them what should properly be done as a post-judgment remedy. Surely, this is not grounds for Certiorari.

Petitioners have merely restated their arguments at the District Court and the Court of Appeals levels. They have not shown significant reasons why Certiorari should be granted.

Therefore Respondent respectfully requests that certiorari be denied.

Respectfully submitted,

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Dated: December 18, 1992

Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

No. 92-911

In The

Supreme Court of the United States

October Term, 1992

PIPEFITTERS PENSION TRUST;
PIPEFITTERS LOCAL UNION NO. 562;
JOHN MARSHAL, administrator and fiduciary of all plaintiff funds;
LESTER GROSS, JOE BARRY, DON DEVITT, ROBERT MCDONALD, trustees,

Petitioners,

v.

RUSSELL WALDO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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January 5, 1993

QUESTIONS PRESENTED

I.

WHETHER A DOMINANT SHAREHOLDER AND OFFICER OF A CORPORATION IS AN EMPLOYER AS THAT TERM IS DEFINED BY THE EMPLOYEE INCOME RETIREMENT SECURITY ACT (ERISA) AND PERSONALLY LIABLE FOR THE CORPORATION'S FAILURE TO MAKE EMPLOYEE BENEFIT FUND CONTRIBUTIONS.

II.

WHETHER THE COURT OF APPEALS APPLIED THE PROPER RULE OF LAW IN DECIDING THAT THE SOLE SHAREHOLDER AND OFFICER OF A CLOSELY HELD CORPORATION WAS NOT PERSONALLY LIABLE FOR THE CORPORATION'S UNPAID CONTRIBUTIONS TO EMPLOYEE BENEFIT FUNDS GOVERNED BY ERISA.

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ARGUMENT

I.

THERE ARE IMPORTANT ISSUES OF FEDERAL LAW TO BE DECIDED WHICH ARE PRESENTED BY THIS CASE AND WHICH SHOULD BE RESOLVED BY THIS COURT.

The Respondent argues in his Brief in Opposition that the various Courts of Appeals have properly settled the issues surrounding the personal liability of a sole shareholder for unpaid ERISA contributions. Because the Federal Courts of Appeal have devised fair and equitable tests to determine the personal liability of a sole shareholder for unpaid ERISA contributions, Respondent argues that this Court need not grant certiorari to settle this important federal question (Respondent's Brief 11-12).

Contrary to the assertions of the Respondent, the circumstances upon which a sole shareholder is liable for unpaid

employee benefits is a significant federal question which deserves to be settled by this Court (Respondent's Brief, Page 22). To limit a sole shareholder's liability for unpaid ERISA contributions to those circumstances wherein the court is justified in piercing the corporate veil is hardly a fair and equitable test which complies with the language and, more importantly, the intent of ERISA.[1] Limiting the liability of sole shareholders to those circumstances where it is appropriate to pierce the corporate veil, impermissibly sanctions the looting of ongoing businesses. Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989), Dissent at 644, 645; although we submit the facts here do clearly support the

[1]The actual Defendants named in the style of the case on the first remand to the District Court were Waldo R. Inc., R. Waldo, Inc. and Russell Waldo, individually.

piercing of the corporate shield. The conduct of Russell Waldo, the sole shareholder of R. Waldo, Inc. and Waldo R. Inc. should cause him to be held personally liable for the unpaid ERISA contributions of the corporation.

In 1982 a representative of the Petitioners, Pipefitters Union Local No. 562, met with Respondent for the purpose of organizing the employees of R. Waldo, Inc. After negotiation, Russell Waldo agreed to form a separate corporation, Waldo R. Inc. and sign a Collective Bargaining Agreement with the Union. Later in 1982 R. Waldo, Inc. agreed to sell to Russell and Shirley Waldo a tract of land valued by him for Ninety Five Thousand Seven Hundred Eight Dollars ($95,708.00). The Deed listed the consideration to be one (1) dollar. Seventy one (71) shares of R. Waldo, Inc. stock were exchanged for this land. The

Pipefitters Union Local No. 562 and Waldo R. Inc. executed a Collective Bargaining Agreement during this time period. The Deed recording the sale of the property was not recorded by Russell and Shirley Waldo until August 28, 1985 and under established Missouri law therefore never took place prior thereto. Hays v. Pumphrey, 125 S.W. 1109 (1910). In November 1986, Mr. and Mrs. Waldo sold the property in question for Five Hundred Fifty Thousand Dollars ($550,000.00). (See generally, Pipefitters v. R. Waldo Inc., Petitioner's Appendix C).

The National Labor Relations Board found that R. Waldo, Inc. violated Section 8(a)(2) and 8(a)(3) of the Labor Management Relations Act by executing an agreement with the Congress of International Unions at a time when both the employer and the CIU knew that all but one employee had signed dues authorization

cards with the Pipefitters Union herein. Russell Waldo interrogated his employees concerning their Union sentiments and threatened to and did discharge those employees who showed support for Pipefitters Local Union No. 562. R. Waldo Inc., 280 N.L.R.B. No. 135, 124 L.R.R.M. 1046 (1986). Russell Waldo signed a Collective Bargaining Agreement obligating Waldo R. Inc. to pay wages and make contributions to employee benefit funds in accordance with the Collective Bargaining Agreement. At the same time, Waldo diverted work from Waldo R. Inc. to R. Waldo, Inc. and failed to pay his employees the proper wages and fringe benefits to which they were entitled.

The federal courts vary as to whether the test set out in Seymour v. Hull & Moreland Engineering, 605 F.2d 1105 (9th Cir. 1979) must be met in order to pierce the corporate veil and attach personal

liability to a sole shareholder for unpaid ERISA contributions. The Court held in Amalgamated Insurance Fund v. Danin, 648 F.Supp. 1142 (D. Mass. 1986) that a corporate officer who exercises unilateral control over the day-to-day operations of the corporation, who has significant ownership interest, who acts on behalf of the corporation with respect to employee benefit plans and who continues to operate the corporation without regard for the financial adversity facing the corporation should be personally liable for unpaid ERISA contributions. These facts were stipulated and found to exist in the case at bar.

Similarly, in Leddy v. Standard Dry Wall Inc., 875 F.2d 383 (2nd Cir. 1989), the Court held that even a dominant shareholder is liable for unpaid ERISA contributions where the employer had engaged in a scheme to divert work from

the employer to non-union corporations who were not obligated to pay ERISA contributions. General principles of limited shareholder liability should not afford protection to controlling shareholders who make improper investments with employee benefit funds given the statutory safeguards enacted to protect ERISA funds. Lowen v. Tower Asset Management, 829 F.2d 1209 (2nd Cir. 1987).

This Court must determine whether general principles of limited shareholder liability will protect sole shareholders who fail to make proper contributions to employee benefit plans. Petitioner urges that this Court adopt the reasoning of the federal courts in the above-referenced decisions and attach personal liability to sole shareholders for unpaid ERISA contributions where the sole shareholder has engaged in improper self-dealings and misdealings with the assets of the

corporation and has illegally diverted work from the corporation to avoid its obligation to make employee benefit contributions. This is an important question of federal law which remains to be decided. This Court in Jim McNeff, Inc. v. Todd, 461 U.S. 260, 265-266, 270 n. 9 n. 12 (1983) stated:

> "Nothing in the legislative history of §8(f) indicates Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper."

This Court further ruled that "in all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation." Pepper v. Litton, 308 U.S. 295, (1939) n. 28. This is certainly the case with Russell Waldo and Waldo R. Inc. After establishing two sole shareholder "Waldo" corporations and agreeing to a Collective Bargaining

Agreement with the Pipefitters Local Union No. 562, Russell Waldo, in violation of contract, diverted work from one corporation to his other corporation in order to avoid making contributions to the employee benefit plans and pay his employees the bargained-for wage.

Not only did Russell Waldo improperly divert work from Waldo R. Inc. to R. Waldo, Inc. so as to avoid paying wages and employee benefits in accordance with the Collective Bargaining Agreement, but Russell Waldo also improperly dealt with the assets of the corporation as if they were his personal assets. As set out above, Russell and Shirley Waldo received property from R. Waldo, Inc., by his own standard valued at over Ninety Five Thousand Dollars ($95,000.00), in exchange for 71 shares of stock in R. Waldo, Inc. Given the timing of the transfer and the law suits pending at that time, it can be

inferred that the purpose of the transfer was to divest the corporation of assets. This is even more clear given the ultimate sale of the corporate property by Russell and Shirley Waldo for Five Hundred Fifty Thousand Dollars ($550,000.00) without regard to the corporate debts.

The conduct of Russell Waldo with respect to the employee benefit funds which are subject of this lawsuit is clearly as culpable as that of the shareholders in Amalgamated Insurance Fund, Leddy, and Lowen, supra. In each of those cases, the Court held that, given the nature of the ERISA statute, the general rule of limited liability for shareholders should be disregarded and the shareholders made personally liable for unpaid ERISA contributions. This Court should grant certiorari in order to settle the issue as to when a sole shareholder may be held liable for his misdeeds which

result in unpaid ERISA contributions. ERISA was created to prevent this exact type of abuse.

CONCLUSION

This case[2] presents an important question of federal law which should be settled by this Court by granting Petitioners' Writ of Certiorari.

[2]Respondent, in his Brief in Opposition, alleged our incorrect citation of this case. They misunderstood. The case cited in our Petition for Writ of Certiorari was the previous ruling of the Court of Appeals for the Eighth Circuit in favor of the original Plaintiffs/Petitioners herein.

Respectfully submitted,

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